Supreme Court of the United States

OCTOBER TERM, 1966

No. 673

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

ESTATE OF HERMAN J. BOSCH, DECEASED, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Proceedings in the United States Court of Appeals for the Second Circuit		
Appendix B to the Brief for the petitioner consisting of proceedings before the United States Tax Court	A	1
General docket entries	1	1
Petition	3	3
Exhibit "A"—Notice of deficiency	8	7
Answer	9	8
Stipulation	11	9
Proceedings	15	12
Appearances	15	12
Opening statement of Mr. Clark for petitioner	15	12
Colloquy between Court and counsel	20	15

	Original	Print
Proceedings in the United States Court of Appeals for the Second Circuit—Continued		
Appendix B to the Brief for the petitioner consisting of proceedings before the United States Tax Court—Continued		
Opinion, Raum, J.	23	18
Decision	32	25
Petition for review	33	26
Exhibit 1A to stipulation—Trust agreement of April 9, 1930	34	27
Exhibit 2B to stipulation—Amendment of February 6, 1931 to Trust Agreement of April 9, 1930	42	33
Exhibit 3C to stipulation—Letter from Irving Trust Co. to Mrs. Margaret Bosch	45	36
Exhibit 4D to stipulation—Office memorandum of Irving Trust Co., re. Estate of Herman J. Bosch	46	37
Exhibit 5E to stipulation—Release by Margaret Bosch of power of appointment dated October 25, 1951	47	39
Exhibit 6F to stipulation—Petition and order to show cause in the Supreme Court of New York, County of Nassau, to determine validity of release of power of appointment	49	41
Exhibit 10J—to stipulation—Order of Supreme Court of New York, County of Nassau, holding invalid attempted release of power of appointment	54	45
Opinion, Hays, J.	57	48
Dissenting opinion, Friendly, J.	68	58
Judgment	78	66
Clerk's certificate (omitted in printing)	80	66
Order extending time to file certiorari	81	67
Order allowing certiorari	82	68

[fol. A]

In the United States Court of Appeals for the Second Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF HERMAN J. BOSCH, DECEASED, IRVING TRUST COMPANY, EXECUTOR, RESPONDENT

On Petition for Review of the Decision of the Tax Court of the United States

APPENDIX B TO THE BRIEF FOR THE PETITIONER

[fol. 1]

TAX COURT OF THE UNITED STATES

DOCKET NO. 89110

ESTATE OF HERMAN J. BOSCH, DECEASED, IRVING TRUST COMPANY, EXECUTOR, One Wall Street, New York 5, NEW YORK, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

APPEARANCES FOR PETITIONER:

John A. Clark, Esq.,
c/o Davies, Hardy & Schenck
Two Broadway
New York 4, New York 10004

GENERAL DOCKET ENTRIES

Date			Filings and Proceedings
Month	Day	Year	
Sept.	14,	1960	PETITION FILED: FEE PAID 9/14/60, Served Sept. 14, 1960
Oct.	14,	1960	ANSWER filed by resp.
Oct.	14,	1960	REQUEST by resp. for trial at New York, N.Y. Action Granted 10/17/60.
Dec.	3,	1962	ORDER calendaring case for special trial status report, March 4, 1963, New York, N.Y., Served Dec. 3, 1962
Mar.	4,	1963	HEARING at New York, N.Y. by Judge Train Report on Trial Status.

Date			Filings and Proceedings
Month	Day	Year	
Mar.	15,	1963	TRANSCRIPT of proceedings of March 4, 1963 received.
Mar.	16,	1964	ORDER, that case is calendared for Special Session on May 18, 1964 at New York, N. Y. for status report. Served Mar. 19, 1964
Apr.	14,	1964	JOINT MOTION to place case on trial calendar on June 1, 1964 at New York, N. Y. Action Granted 4/15/64, Served Apr. 16, 1964
Apr.	16,	1964	NOTICE of Trial at New York, New York, June 1, 1964. Served Apr. 16, 1964
June	1,	1964	TRIAL at New York, N.Y. by Judge Raum Submitted on Stipulation of Facts. Stipulation of Facts with joint exhibits filed. Petr. Brief due July 16, 1964, Resp. Brief in answer due August 17, 1964. Petr. Brief in reply due September 1, 1964.
[fol. 2]			
			UNDER SUBMISSION—JUDGE RAUM
June	17,	1964	TRANSCRIPT of Trial of June 1, 1964 received.
July	16,	1964	MOTION by petr. (No. Objec. by resp.) to extend time for filing petr's brief from July 16, 1964 to July 30, 1964. Action Granted July 17, 1964, Served July 20, 1964.
July	22,	1964	ORIG. BRIEF filed by petitioner. 20 p. copies, Served Jul 22, 1964
Aug.	31,	1964	BRIEF IN ANSWER filed by respondent. Served Sept. 2, 1964
Sept.	11,	1964	BRIEF IN REPLY filed by petr. (Perm. to file) 20 P. copies. Served Sep 14, 1964
Nov.	3,	1964	OPINION filed, Judge Raum. Decision will be entered under Rule 50. Served Nov. 3, 1964
Jan.	28,	1965	AGREED COMPUTATION filed.
Feb.	2,	1965	DECISION entered, Judge Raum. Served Feb. 2, 1965
			APPELLATE PROCEEDINGS
Apr.	30,	1965	PETITION FOR REVIEW by USCA 2nd Cir. filed by Resp. Served 4/30/65
Apr.	30,	1965	NOTICE OF FILING Petition for Review sent to counsel for petr. Served 4/30/65
Apr.	30,	1965	ORDER enlarging time for filing record on review to July 29, 1965. Served 4/30/65
Apr.	30,	1965	NOTICE of Extension of Date of Transmission of record on review to the parties. Served 4/30/65
May	4,	1965	PROOF OF SERVICE of petition for review filed.

[fol. 3]

BEFORE THE TAX COURT OF THE UNITED STATES

Docket No. 89110

ESTATE OF HERMAN J. BOSCH, DECEASED, IRVING TRUST COMPANY, EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

PETITION—Filed Sept. 14, 1960

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency dated June 20, 1960, and as a basis of its proceeding alleges as follows:

1. The petitioner is a fiduciary with its principal office at One Wall Street, New York 5, New York. The return for the estate here involved was filed with the District Director for the Upper Manhattan District of New York.

2. The notice of deficiency (a copy of which is attached hereto and marked Exhibit A) was mailed to the petitioner on June 20, 1960.

3. The deficiency as determined by the Commissioner is in estate tax in the amount of $26,958.77 of which approximately $26,274.68 is in dispute.

[fol. 4] 4. The determination of the tax set forth in the said notice of deficiency is based upon the following errors:

a. The Commissioner erred in determining that the corpus of the inter vivos trust created by the decedent on April 9, 1930, which had a fair market value of $70,222.04 at the alternate valuation date, does not qualify for the marital deduction under Section 2056 of the Internal Revenue Code of 1954.

b. The Commissioner erred in disallowing $32,803.92 of the marital deduction, thereby reducing said deduction from the amount of $749,492.34 as shown on the estate tax return to the amount of $716,688.42.

c. The Commissioner erred in failing to determine that the marital deduction should be increased to $752,217.76 from the $749,492.34 shown on the estate tax return.

d. The Commissioner erred in failing to allow as a credit against the Federal Estate Tax, estate taxes paid to the State of New York in the amount of at least $14,431.92.

5. The facts upon which the petitioner relies as a basis for the proceeding are as follows:

a. The decedent, Herman J. Bosch, died on April 6, 1957.

b. On July 7, 1958, the petitioner filed the Federal Estate Tax Return on form 706 for the estate of the decedent, which showed a tax to be due of $148,363.26, with the District Director of Internal Revenue for the Upper Manhattan District of New York. On July 6 and July [fol. 5] 7, 1958, the petitioner paid $148,737.18 on account of the tax shown to be due on the return.

c. On April 9, 1930, the decedent created a trust which provided for the payment of the income therefrom to the decedent's wife, Margaret Bosch, for her life with a reversion to the grantor if his wife should predecease him, or to his estate if he should predecease his wife leaving a will or to his next of kin if he should die intestate. The trust also contained provisions which reserved to the grantor the right to alter or amend the trust at any time during his life with the consent of the trustee and the further right, without the consent of the trustee or any other person, to revoke the trust in whole or in part. A copy of said trust is attached hereto and marked Exhibit B.

d. On February 6, 1931, the decedent exercised his right, with the consent of the trustee, to amend the April 9, 1930 trust in order to provide that his wife should have a general power of appointment over the property of the trust exercisable by will if she should survive the grantor

and in default of such appointment, one-half to his next of kin and one-half to her next of kin. The power in the grantor to further alter, amend or revoke the trust during his lifetime was undisturbed by this amendment. A copy of said amendment dated February 6, 1931 is attached hereto and marked Exhibit C.

e. On October 25, 1951, the decedent's wife, Margaret Bosch, executed an instrument by which she purported to effect a partial release of the general power of [fol. 6] appointment granted to her by the April 9, 1930 trust as amended. A copy of said instrument is attached hereto and marked Exhibit D. It is the position of the petitioner that the purported partial release was a nullity so the corpus of the trust, being subject to a general power of appointment in the decedent's wife at the time of the decedent's death, qualifies for the marital deduction under Section 2056 of the Internal Revenue Code of 1954.

f. Including the corpus of the April 9, 1930 trust, the total value of property passing to the decedent's wife, which qualifies for the marital deduction, is $786,910.46.

g. Adjustments made by the Commissioner to which the petitioner has agreed have resulted in increasing the value of the adjusted gross estate, as defined in Section 2056 (c) (2) of the Internal Revenue Code of 1954, to $1,504,435.51 from the $1,498,984.68 reported on the estate tax return for said Estate.

h. As a result of the said agreed adjustments, the maximum marital deduction, which is deductible in computing the value of the net estate for Federal estate tax purposes, is increased from the amount of $749,492.34 as shown on the estate tax return for said Estate to the amount of $752,217.75.

WHEREFORE, the petitioner prays that this Court may hear the proceeding and determine that the deficiency in estate tax due from the petitioner should not be in excess of $684.09.

/s/ JOHN A. CLARK
Counsel for Petitioner
JOHN A. CLARK
c/o Davies, Hardy & Schenck
Two Broadway,
New York 4, New York

Of Counsel:

DERMOD IVES
ROBERT D. TAISEY
MARILYN WALSH

[fol. 7]

[Duly Sworn to by John F. McIlwain
Jurat Omitted in Printing]

[fol. 8]

EXHIBIT A TO PETITION—Notice of Deficiency

June 20, 1960

Estate of Herman J. Bosch
Irving Trust Company, Executor
One Wall Street
New York 5, New York

* * * *

EXPLANATION OF ADJUSTMENTS

* * * *

	Returned	Determined
Marital deduction	$749,492.34	$716,688.42
Adjustment		$32,803.92

It is held that the corpus of an inter vivos trust created by the decedent on February 6, 1931, which has a fair market value of $70,222.04 at the alternate valuation date, does not qualify for the marital deduction within the purview of section 2056 of the Internal Revenue Code of 1954.

It is further held that marital deduction in the amount of $716,688.42 is allowable, computed as follows:

Gross estate as corrected	$1,622,014.43
Less: Schedules J and K items	117,578.92
Adjusted gross estate as corrected	$1,504,435.51
Less: Nontestamentary property	91,806.32
Net testamentary estate	$1,412,629.19
One-half net testamentary estate	$ 706,314.59
Less: Legacies to widow	48,026.00
Martial trust	$ 658,288.59
Property outside will qualifying for marital deduction	10,373.83
Legacies to widow	$ 668,662.42
	48,026.00
Marital deduction	$ 716,688.42

* * * *

[fol. 9]

BEFORE THE TAX COURT OF THE UNITED STATES

* * * *

ANSWER—Filed Oct. 14, 1960

THE RESPONDENT for answer to the petition filed in the above-entitled case admits and denies as follows:

1, 2, 3. Admits the allegations of paragraphs 1, 2 and 3 of the petition.

4. a,b,c,d. Denies the respondent erred as alleged in subparagraphs a,b,c,d, inclusive, of paragraph 4 of the petition.

5. a,b,c,d. Admits the allegations of subparagraphs a,b,c,d, inclusive, of paragraph 5 of the petition.

e. Admits that on October 25, 1951, decedent's wife, Margaret Bosch, executed an instrument. Denies the remaining allegations contained in subparagraph e of paragraph 5 of the petition.

f. Denies the allegations contained in subparagraph f of paragraph 5 of the petition.

g. Admits the allegations contained in subparagraph g of paragraph 5 of the petition.

h. Denies the allegations contained in subparagraph h of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified or denied.

[fol. 10] WHEREFORE, it is prayed that the appeal be denied and the determination of the respondent be in all things approved.

/s/ HART H. SPIEGEL
HART H. SPIEGEL
Chief Counsel
Internal Revenue Service

OF COUNSEL:

WM. V. CROSSWHITE
Regional Counsel
PHILIP SHURMAN
Special Attorney
Internal Revenue Service
90 Church Street
New York 7, New York

[fol. 11]

BEFORE THE TAX COURT OF THE UNITED STATES

* * * *

STIPULATION—Filed June 1, 1964

It is hereby stipulated and agreed between the Commissioner of Internal Revenue and the above entitled taxpayer, by their respective undersigned attorneys, that the following facts shall be taken as true and all exhibits referred to herein are incorporated in this stipulation and made a part hereof, provided, however, that this stipulation does not waive the right of either party to introduce other evidence not at variance with the facts herein stipulated, or to object to the introduction in evidence of any such facts on the grounds of immateriality or irrelevancy.

1. The decedent, Herman J. Bosch, died testate a resident of the State of New York on April 6, 1957.

2. The petitioner, Irving Trust Company, was named the executor of the will of Herman J. Bosch and was duly qualified as such before the Surrogate's Court of Westchester County.

3. On July 7, 1958, the petitioner filed the Federal Estate Tax Return on Form 706 for the estate of the decedent which showed a tax to be due of $148,363.26, with the Director of Internal Revenue for the Upper Manhattan District. On July 6, and July 7, 1958 the petitioner paid $148,737.18 on account of the tax shown to be due on this return.

[fol. 12] 4. On November 17, 1958 the petitioner made a payment in the amount of $13,500.00 to the said Director of Internal Revenue.

5. On April 9, 1930 the decedent created a trust. The Irving Trust Company was named the trustee of said trust. A copy of said trust agreement is attached hereto and marked Exhibit 1-A.

6. On February 6, 1931 the decedent executed an instrument amending the said trust agreement, a copy of which is attached hereto and marked Exhibit 2-B.

7. In October of 1951 the Irving Trust Company as trustee of the trust communicated with the decedent and

Margaret Bosch pointing out the provision in the trust agreement for a general power of appointment exercisable by will which had been granted to Margaret Bosch and suggesting that they might wish to take necessary steps to eliminate the said power of appointment assigning as the reason therefor to prevent the assets of the trust being taxed as part of Margaret Bosch's estate. A copy of a letter dated October 16, 1951 from Marion Quell of Irving Trust Company to Mrs. Margaret Bosch is attached hereto and marked Exhibit 3-C. A copy of a memorandum dated October 19, 1951 and initialled by Miss Quell is attached hereto and marked Exhibit 4-D.

8. On October 25, 1951, Margaret Bosch executed an instrument, a copy of which is attached hereto and marked Exhibit 5-E.

[fol. 13] 9. The Irving Trust Company as trustee of said trust filed a petition dated January 25, 1963 with the Supreme Court of the State of New York, County of Nassau. The said Court issued an order to show cause upon the said petition in which it designated Zola A. Aronson as guardian ad litem of an infant respondent. A copy of the petition and order to show cause is attached hereto and marked Exhibit 6-F.

10. The event which prompted the Irving Trust Company as trustee to petition for the allowance of its intermediate account and for a determination as to the validity of the October 25, 1951 instrument was the determination by the Internal Revenue Service that the October 25, 1951 instrument was effective to reduce the general power of appointment in Margaret Bosch which was provided in the February 6, 1931 amendment to the trust agreement to a special power and accordingly, that the principal of the trust did not qualify as a part of the marital deduction in the decedent's estate.

11. On March 14, 1963, Margaret Bosch made a motion in the Supreme Court of the State of New York, County of New York to have the place of trial on the petition for accounting and construction changed from Nassau County to New York County. This motion was subsequently granted over the objection of the guardian ad litem Zola A. Aronson.

12. Briefs with respect to the question of the validity of the October 25, 1951 instrument were filed with the court by the Irving Trust Company as trustee (Exhibit 7-G), Margaret Bosch as a respondent (Exhibit 8-H) and Zola A. Aronson as guardian ad litem of Peter Bosch an [fol. 14] infant respondent (Exhibit 9-I).

13. On November 8, 1963, Judge Irwin D. Davidson of the Supreme Court for New York County issued an opinion containing his determination as to the validity of the October 25, 1951 instrument. A copy of said opinion is attached hereto and marked Exhibit 10-J.

14. On January 3, 1964, the judgment of the Supreme Court for New York County was rendered by Judge Davidson allowing the account of the Irving Trust Company as trustee of the trust and rendering the final determination of the court as to the validity of the October 25, 1951 instrument. A copy of said judgment is attached hereto and marked Exhibit 11-K.

/s/ JOHN A. CLARK
Counsel for Petitioner

/s/ SHELDON S. COHEN
SHELDON S. COHEN
Chief Counsel
Internal Revenue Service

[fol. 15]

BEFORE THE TAX COURT OF THE UNITED STATES

* * * *

PROCEEDINGS

THE CLERK: Docket No. 89110, Estate of Herman J. Bosch.

Will counsel state their appearances, please.

APPEARANCES

MR. CLARK: John A. Clark for the petitioner.

MR. SHURMAN: Philip Shurman for the respondent.

May it please the Court, at this time I would like to file the joint stipulation of facts which contains Joint Exhibits 1-A through 11-K.

THE COURT: I will receive it.

(The stipulation of facts and Joint Exhibits 1-A through 11-K for identification were received in evidence.)

OPENING STATEMENT ON BEHALF OF PETITIONER

By Mr. Clark

MR. CLARK: If it please the Court, this matter involves the estate taxes on the estate of Herman J. Bosch. Specifically involved is a trust which the decedent created in 1930. The provisions of this trust gave the income to the wife, to the decedent's wife, for her lifetime with the remainder over after her death to the decedent or his estate.

The decedent by the terms of the trust retained the unqualified right to alter, amend or revoke the trust at [fol. 16] any time prior to his death. Because of this retained right, there is no question as to the includability of this trust in the decedent's gross estate.

This whole question here involved is whether or not this trust qualifies for the marital deduction in the decedent's estate.

In 1931 the decedent exercised his right of amendment and provided in the trust that if his wife survived him, that is, if the decedent predeceased his wife, his wife would thereafter have a general power of appointment over the trust property exercisable by her will. There were gifts over in default of an appointment in the event that the wife did not exercise her power of appointment.

This was the only amendment that the decedent ever made to the subject trust.

In 1951 the decedent's wife, just before the expiration of the time limitation contained in the powers of appointment act of 1951 executed an instrument by which she purported to limit the power of appointment contained in the trust agreement to a special power of appointment.

Our question specifically presented here is as to the effectiveness and validity of this 1951 instrument. It is the petitioner's position that this 1951 instrument was under New York law a nullity and wholly ineffective to cut down the general power of appointment contained in the trust instrument to a special power.

Accordingly, it is our position that a general power of appointment in the wife still exists or still existed at the [fol. 17] date of the decedent's death and accordingly that the trust qualifies for the marital deduction.

The respondent's position, of course, is that the 1951 instrument was effective; that it cut down the general power to a special power, and, accordingly, that the marital deduction should not be allowed for the assets of the trust.

The petitioner's position in this respect is based upon section 183 of the New York Real Property Law. This section of the New York law provides in effect that a power which is exercisable—and I want to place emphasis upon the use in the statute of the word "exercisable"—is realizable by an instrument properly executed.

Under the trust as it was set up by the amendment in 1931, the wife's general power of appointment here was not exercisable until the appointment at which the decedent predeceased her. In 1951, when she purported to partially release this general power of appointment, the decedent was still alive. Accordingly, the power, as con-

tained in the trust agreement, was still in an inchoate state and had not yet become exercisable by the wife.

Accordingly, under section 183, the requirements of that section for a power to be realizable had not yet been fulfilled and, accordingly, the instrument which the wife executed in 1951 purporting to release those, that power, was a nullity because it did not fulfill the requirements of the New York statutory law.

Following the Commissioner's determination that this [fol. 18] trust did not qualify for the marital deduction, the trustee, in order to get an official determination of the status of the power of appointment, petitioned the New York Supreme Court for a construction of the trust agreement, presenting specifically to that court for determination the question as to the validity of the 1951 instrument which the wife executed.

The New York Supreme Court duly considered this question and published a rather detailed opinion on it, which is contained in the stipulation of fact, by which the court found that the 1951 instrument was a nullity; that it was wholly ineffective to affect the power of appointment contained in the original instrument, and based its conclusion thereon on section 183 of the New York Real Property Act.

Accordingly, the first question which this Court would have to address itself to would be the weight to be accorded to the decision of the New York Supreme Court rendered upon that construction provision which was brought by the trustee. It is the petitioner's position on this question that the decision of the New York Supreme Court is binding upon this Court as it pertains to a matter of local New York law in a determination of the validity of this 1951 instrument.

THE COURT: Who were the parties in that case?

MR. CLARK: All of the parties of interest in the trust, all of the beneficiaries—as a matter of fact, there was a special guardian for some of the remaindermen or some of the contingent remaindermen. All parties in interest in the trust were cited in that proceeding. Briefs [fol. 19] were filed by the trustee, by the attorney for the life beneficiary and by the special guardian. I might point

out, anticipating the respondent's pointing it out for me, that all these briefs took the same tack or presented the same side of the argument, that this 1951 instrument was a nullity and ineffective to cut down the general power of the appointment.

However, we feel that that does not militate against the situation of the determination of the local court being binding. What we are involved with here is not a mere consent decree as to the distribution of property in an estate, but with a considered opinion by a court of New York State determining a question of local law which ultimately fixed the rights of the parties as that law involved them.

THE COURT: Was the proceeding non-adversary in the sense that no one had any interest in the court's coming out one way or the other?

MR. CLARK: You might say that that's correct, your Honor. In effect nobody raised a dissenting voice in these proceedings. However—and here we get to a point of law which is slightly muddled, depending on where you happen to be in the United States—under the situation with which we are presented here, in the Third Circuit there are cases there which claim or hold that where an issue of local law is directly presented to the Court, the Court duly considers it, presents itself to it, and makes a finding on that basis, particularly in a situation such as we have here [fol. 20] of a detailed published opinion which could be used as precedent for that interpretation of the New York law, that that is a determination which is binding upon the federal courts on the basis that no local judge would prostitute himself to the point of making a pronouncement as to the interpretation of local law in a legal question merely for the purpose of accommodating parties to the cause.

COLLOQUY BETWEEN COURT AND COUNSEL

THE COURT: Is this the sole question in the case, then, whether the state court decree in this matter is binding?

MR. CLARK: I might mention on that, your Honor—

MR. HURMAN: That is a collateral issue.

MR. CLARK: That would be the first thing, it would seem to me, that the Court should address itself. Of course if the Court finds that this local law, this local decree is binding, then that determines the issue.

THE COURT: That would be the end of the case?

MR. SHURMAN: Yes, your Honor. If it is binding on this Court.

MR. CLARK: That's right.

MR. SHURMAN: The local decision is binding on the parties but not on this Court nor on respondent.

MR. CLARK: Of course, if this Court should determine that the decision of the New York Supreme Court is not binding upon it, then it would have to go as a second matter to address itself to the interpretation of New York law as to the validity of this 1951 instrument and [fol. 21] its effectiveness to cut down the general power of appointment to a special power.

MR. SHURMAN: The only thing that I can add, your Honor, is that it is respondent's position that the interest of the decedent's surviving spouse, both at the time of this decedent's death and at all times after October 25, 1951 was such an interest which would not qualify for the marital deduction; in other words, the wife's interest at that particular time and after October 25, 1951, did not give her any power, any general power of appointment. She did have it and gave it up. So as of the date of the decedent's death, not having a general power of appointment but merely a life estate, that interest will not qualify for the marital deduction.

It is also respondent's position, in so far as the decision of the Supreme Court is concerned, that the Supreme Court decision was issued in a non-adversary proceeding, not one of the parties was in any way affected by the outcome that the parties were looking forward to; it is also respondent's position that the Supreme Court decision is wrong as a matter of law, both as to basic law, as to the law of the State of New York, and it also is contrary to decisions of this Court and the Court of Appeals.

THE COURT: Has the time elapsed for an appeal in that New York State decision?

MR. CLARK: I believe it is.

MR. SHURMAN: Yes, your Honor.

THE COURT: And no appeal was taken.

[fol. 22] MR. CLARK: No appeal was taken.

THE COURT: Does that appear in the stipulation of facts here?

MR. SHURMAN: I believe it does. I think we covered that. I would say yes, your Honor, that the time for the appeal has expired.

MR. CLARK: No, we do not.

MR. SHURMAN: No, I think we left it out.

MR. CLARK: It is not so stated there.

THE COURT: Do you wish to stipulate now?

MR. CLARK: I would stipulate that no appeal was taken and to the best of my knowledge—I am sure that the time for filing an appeal would have expired by now.

MR. SHURMAN: That's correct, your Honor.

THE COURT: Do you so stipulate?

MR. CLARK: I so stipulate.

THE COURT: Very well.

Off the record.

(Discussion off the record.)

* * * *

[fol. 23] 43 T. C. No. 11

BEFORE THE TAX COURT OF THE UNITED STATES

ESTATE OF HERMAN J. BOSCH, DECEASED, IRVING TRUST COMPANY, EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 89110

Filed November 3, 1964

Held, in the circumstances of this case decision of Supreme Court of New York is accepted as an authoritative adjudication in respect of widow's power of appointment over remainder interest in trust with the consequence that marital deduction is allowed.

John A. Clark, for the petitioner.

Philip Shurman, for the respondent.

OPINION—Nov. 3, 1964

RAUM, *Judge*: The Commissioner determined an estate tax deficiency in the amount of $26,958.77 in respect of the estate of Herman J. Bosch, who died on April 6, 1957, a resident of New York. At issue is whether his surviving spouse's interest in an inter vivos trust created by him qualifies for the marital deduction. The facts have been stipulated.

Bosch created the trust in question on April 9, 1930, to pay the income therefrom to his wife for her life, and upon her death to deliver the corpus to the grantor or his estate. He reserved the right to alter, amend, or revoke,[1] and, pursuant thereto, he amended the trust only once, on February 6, 1931. Under the amendment, his wife continued to be the life beneficiary, and in addition was given

[1] The power to alter or amend was conditioned upon the consent of the trustee, but the power to revoke was absolute.

[fol. 24] a general power to appoint the remainder by will. The trust thereafter remained subject to his continuing power to alter, amend, or revoke.

On October 25, 1951, in order to prevent the corpus of the trust from being included in *her* gross estate, Bosch's wife executed an instrument purporting to make an irrevocable release of a portion of that power of appointment and thus to convert it into a special power of appointment.[2]

If that release were effective, it is not disputed by petitioner that no marital deduction would be available to the estate in respect of the trust by reason of Section 2056(b)(5), I.R.C. 1954.[3] On the other hand, the Government

---

[2] She released merely the power to appoint "in favor of myself, my estate, my creditors or the creditors of my estate", thereby retaining the power to appoint to all others. The parties are not in disagreement that such remaining broad power is to be classified as a special power.

[3] Section 2056(b)(5) provides:

> (b) Limitation in the Case of Life Estate or Other Terminable Interest.—
>
> * * * * * * *
>
> (5) Life Estate with Power of Appointment in Surviving Spouse.—In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse—
>
> (A) the interest or such portion thereof so passing shall, for purposes of subsection (a), be considered as passing to the surviving spouse, and
>
> (B) no part of the interest so passing shall, for purposes of paragraph (1)(A), be considered as passing to any person other than the surviving spouse.
>
> This paragraph shall apply only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

does not challenge the right to the marital deduction if [fol. 25] the 1951 attempted partial release were ineffective, thus leaving the trust as providing for a life estate in the grantor's wife together with a general power of appointment over the remainder.

After commencement of the present litigation, and at least in part for the purpose of affecting its outcome, the trustee, on January 25, 1963, filed a petition with the Supreme Court of the State of New York, seeking a determination as to the effectiveness of Mrs. Bosch's 1951 instrument of partial release. An order to show cause was issued, directed to Mrs. Bosch and some 23 other persons, who were possible beneficiaries in the event of Mrs. Bosch's death without exercising her power of appointment. The order also appointed a guardian ad litem for one of those persons, who was an infant. Three briefs were filed in that proceeding, one in behalf of the trustee, the second in behalf of Mrs. Bosch, and the third by the guardian ad litem in behalf of the infant. All three briefs argued that under New York law Mrs. Bosch's attempted partial release in 1951, while her husband was still alive and had an unlimited power of revocation, was a nullity. [fol. 26] No argument to the contrary was presented to the New York court, which rendered an opinion adopting the position maintained in the three briefs before it,[4] *Matter of Bosch*, N.Y.L.J., November 15, 1963 (New York Sup. Ct., Special Term), and thereafter, on January 3, 1964, entered judgment in accordance with that opinion.

If the decision of the New York court is to be accepted here that would be the end of the present controversy, for the decedent's wife would be regarded as having a general power of appointment coupled with her life estate, and in such circumstances there is no dispute that the contested marital deduction would be available.

---

[4] The position urged upon the New York court which it adopted was in substance that under New York law a power of appointment created by will could not be exercised (or released) during the testator's lifetime because the will is ambulatory and could be revoked by him at any time, and that petitioner's attempt to release her testamentary power of appointment during her husband's lifetime was likewise a nullity since the entire trust was subject to his unfettered power of revocation until the date of his death.

In general, where the operation of the Federal tax law turns upon the nature of property interests created under state law, an adjudication by a state court in respect of the very property interests involved "is final" where that court has jurisdiction over the subject matter and the proceeding is not collusive. *Blair* v. *Commissioner*, 300 U.S. 5, 10. Cf. *Freuler* v. *Helvering*, 291 U.S. 35; *Sharp* [fol. 27] v. *Commissioner*, 303 U.S. 624, reversing 91 F. 2d 802 (C.A. 3). However, it has also been held in an impressive number of cases that where the state court proceeding is nonadversary, the decision is not necessarily binding. E.g., *Estate of M. G. Pierpont* v. *Commissioner*, 336 F. 2d 277 (C.A. 4); *First Nat. Bank of Montgomery* v. *United States*, 285 F. 2d 123 (C.A. 5), affirming 176 F. Supp. 768 (D. Ala.); *Newman* v. *Commissioner*, 222 F. 2d 131, 136 (C.A. 9), affirming 19 T.C. 708; *Wolfsen* v. *Smyth*, 223 F. 2d 111 (C.A. 9); *Saulsbury* v. *United States*, 199 F. 2d 578, 580-581 (C.A. 5); *Faulkerson's Estate* v. *United States*, 301 F. 2d 231 (C.A. 7), certiorari denied, —— U.S. ——; *Brainard* v. *Commissioner*, 91 F. 2d 880, 883-884 (C.A. 7), certiorari dismissed, 303 U.S. 665; *Tatem Wofford*, 5 T.C. 1152; *Estate of Howard E. Stevens*, 36 T.C. 184, 193-194. The law in this field is highly confusing, cf. *Merchants National Bank & Trust Co.* v. *United States*, 246 F. 2d 410, 417 (C.A. 7); *Channing* v. *Hassett*, 200 F. 2d 514, 518 (C.A. 1), and, notwithstanding various efforts to spell out distinctions and rationalizations, a number of other cases appear to have reached opposite conclusions in seemingly comparable circumstances. E.g., *Flitcroft* v. *Commissioner*, 328 F. 2d 449 (C.A. 9), reversing 39 T.C. 52; *Darlington's Estate* v. *Commissioner*, 302 F. 2d 693 (C.A. 3), reversing 36 T.C. 599; *Beecher* v. *United States*, 280 F. 2d 202 (C.A. 3); *Gallagher* v. *Smith*, 223 F.2d 218 (C.A. 3); *Eisenmenger* v. *Commissioner*, 145 F. 2d 103 (C.A. 8), reversing 44 B.T.A. 489.

To be sure, it may be possible to reconcile some of these cases, but the results are not always satisfying. For ex- [fol. 28] ample, a prior decision may be explained away on the ground that there was collusion, but a close inspection of the particular situation would reveal that

there was no magic in the term "collusion" and that it was used merely as a more severe characterization of a nonadversary proceeding. E.g., *Stallworth's Estate* v. *Commissioner*, 260 F. 2d 760, 763 (C.A. 5); *In re Sweet's Estate*, 234 F. 2d 401, 404 (C.A. 10), affirming 24 T.C. 488, certiorari denied, 352 U.S. 878. On the other hand, the state court decree in some cases in effect merely put a label upon a transaction or characterized a past event or otherwise adjudicated some matter that had no substantial practical consequences to the parties involved apart from Federal tax liability; and in such circumstances it would seem that the decree should be treated as having no binding effect in later tax litigation. Cf. *Newman* v. *Commissioner*, 222 F. 2d 131 (C.A. 9); *Wolfsen* v. *Smyth*, 223 F. 2d 111, 113 (C.A. 9); *M. T. Straight Trust*, 24 T.C. 69, affirmed 245 F. 2d 327 (C.A. 8).

We are not disposed to undertake a comprehensive analysis of all of the cases in this field and to attempt to find a rationalization among them which the appellate courts themselves have been unable satisfactorily to do. We content ourselves here with following the general rule in *Blair* v. *Commissioner*, 300 U.S. 5, and related Supreme Court decisions noted above, p. , and we indicate below some of the considerations that we have taken into account.

1. The New York court herein had jurisdiction over the parties and subject matter of the proceeding, and its [fol. 29] judgment is final and conclusive as to those parties. As a consequence, Mrs. Bosch now has a general power of appointment which she may exercise in favor of herself, her estate, her creditors, or the creditors of her estate.

2. Although the Supreme Court of the State of New York is a trial court, it is "a single great tribunal of general state-wide jurisdiction, rather than an aggregation of separate courts sitting in the several counties or judicial districts of the state". *Schneider* v. *Aulisi*, 307 N.Y. 376, 121 N.E. 2d 375, 377 (1954); see New York State Const., Art. 6, Sec. 7. Its decision not only adjudicates the rights of the parties but represents legal precedent for courts throughout the state. The situation is

thus quite different from that involving local courts with limited geographical jurisdiction whose decisions are not binding upon other courts elsewhere within the state. *Brainard* v. *Commissioner*, 91 F. 2d 880, 884 (C.A. 7), certiorari dismissed, 303 U.S. 665; *Faulkerson's Estate* v. *United States*, 301 F. 2d 231, 232 (C.A. 7), certiorari denied, —— U.S. ——.

3. The Commissioner was fully aware of the proceeding in the New York court, and, had he chosen to do so, could have sought the opportunity to present his views to that court. Indeed, the record before us shows that he agreed to a continuance of the hearing in this court, so that the New York proceeding might first be brought to a conclusion.

4. The New York court rendered a reasoned opinion and reached a "deliberate conclusion", *Blair* v. *Commis-*
[fol. 30] *sioner*, 300 U.S. at p. 10. Although, in our judgment, a more persuasive case could possibly be made out for the opposite result, there do not appear to be any contrary decisions and we cannot with confidence say that the New York court was wrong or that its opinion will not be followed by other New York courts.

5. The decision of the New York court, which is binding upon Mrs. Bosch, may have certain offsetting tax consequences in respect of her own estate tax. The New York decree establishing that she has a general power of appointment will result in the inclusion in her gross estate of any property passing under her exercise of that power. Section 2041, Internal Revenue Code of 1954. And we cannot reasonably assume that she will permit that power to remain unexercised, for there are indications in the record that the immediate natural objects of her bounty do not include all of the many relatives of her husband who would take in default of her exercise of the power. Thus, the state court decree provided more than a label for past events that would affect the present litigation; it authoritatively determined the nature of the power of appointment with potentially adverse tax consequences at a later date.

[fol. 31] We emphasize that we reach our conclusion upon the entire record and upon all of the foregoing considerations, taken in the aggregate. Needless to say, one or more of these factors might not be sufficient to tip the scales. Nor is it necessary to say that we are bound by the New York decision. It is sufficient merely to state that, in the foregoing circumstances, we accept the New York decision as an authoritative exposition of New York law and adjudication of the property rights involved.

Decision will be entered under Rule 50.

[fol. 32]

BEFORE THE TAX COURT OF THE UNITED STATES

* * * *

DECISION—Feb. 2, 1965

Pursuant to the opinion of the Court filed November 3, 1964, and the agreed computation of the tax liabilities filed by the parties; and incorporating herein the facts recited in the computation as the findings of the Court, it is

ORDERED and DECIDED: That there is a deficiency in estate tax due from the petitioner in the amount of $14,748.91 of which $13,873.92 has been paid.

/s/ ARNOLD RAUM
Judge.

Entered: Feb. 2—1965

* * * *

It is hereby stipulated that the foregoing decision is in accordance with the opinion of the Court and the agreed computation of the parties, and that the Court may enter this decision, without prejudice to the right of either party to contest the correctness of the decision entered herein, pursuant to the statute in such cases made and provided.

/s/ JOHN A. CLARK
Counsel for Petitioner.

/s/ MITCHELL ROGOVIN
Chief Counsel
Internal Revenue Service

[fol. 33]

BEFORE THE TAX COURT OF THE UNITED STATES

* * * *

PETITION FOR REVIEW—Filed April 30, 1965

The Commissioner of Internal Revenue hereby petitions the United States Court of Appeals for the Second Circuit to review the decision entered by the Tax Court of the United States in the above-entitled case on February 2, 1965, that there is a deficiency in estate tax due from taxpayer in the amount of $14,748.91, of which $13,873.92 has been paid.

The respondent on review is the Estate of Herman J. Bosch, Irving Trust Company, Executor. Herman J. Bosch died on April 6, 1957, a resident of New York. On July 7, 1958, taxpayer's federal estate tax return was filed with the Director of Internal Revenue for the Upper Manhattan District of New York, which district is within the jurisdiction and venue of the United States Court of Appeals for the Second Circuit wherein this review is sought.

This petition is filed pursuant to the provisions of sections 7482 and 7483 of the Internal Revenue Code of 1954.

/s/ LOUIS F. OBERDORFER
LOUIS F. OBERDORFER
Assistant Attorney General

/s/ MITCHELL ROGOVIN
MITCHELL ROGOVIN
Chief Counsel
Internal Revenue Service
Attorneys for Petitioner on Review

OF COUNSEL:

CHARLES OWEN JOHNSON
Attorney
Internal Revenue Service

[fol. 34] EXHIBIT 1A TO STIPULATION

TRUST AGREEMENT, made this 9th day of April 1930, by and between HERMAN J. BOSCH, residing at 85 Cedar Street, Rye, New York, party of the first part (hereinafter referred to as the Grantor), and IRVING TRUST COMPANY, a New York corporation, organized under and pursuant to the banking laws of the State of New York, having an office at Park Avenue and 42nd Street, New York City, party of the second part (hereinafter referred to as the Trustee).

WITNESSETH:

The Grantor, for and in consideration of the agreements hereinafter contained, and of the sum of One Dollar ($1.00) lawful money of the United States to the Grantor in hand paid by the Trustee, at or before the ensealing and delivery of these presents, the receipt whereof by the Grantor is hereby acknowledged, hereby sells, assigns, transfers and sets over to the Trustee the securities and property set forth upon Schedule A annexed to this agreement, and initialed for identification by the parties hereto, which Schedule A is hereby made a part of this agreement, IN TRUST, NEVERTHELESS, for the uses and purposes hereinafter set forth, as follows:

FIRST: To hold, invest and reinvest the same (subject to the provisions hereinafter set forth), and to collect the issues and income thereof and to pay to or apply to the use of MARGARET BOSCH, the wife of the Grantor now residing at 85 Cedar Street, Rye, New York (hereinafter referred to as the Beneficiary), the net income [fol. 35] thereof, in quarterly installments, during her life, and upon the death of the beneficiary, to pay over, transfer and deliver the principal of the trust fund to the Grantor, if living, and if not living, then to the executors or administrators c.t.a. appointed to administer the estate of the Grantor, provided, however, that should the Grantor die intestate in the lifetime of the beneficiary, then upon the death of the beneficiary, to pay over, transfer and deliver the principal of the fund to the then next of kin of the Grantor, as determined by the laws of the State of New York then obtaining, in the same propor-

tions as they would have been entitled to the personal estate of the Grantor if his death had occurred at that time.

SECOND: This agreement, and the trust hereby created, is subject to the terms, conditions and provisions as follows:

The Grantor reserves to himself the right, during his life and the existence of the trust, to direct and control the action of the Trustee in making sales and/or purchases of securities as investments constituting the principal of the trust fund. The Trustee shall, from time to time, reinvest the trust fund and shall, from time to time, sell the investments and reinvestments of the trust fund, at such prices and on such terms as shall be directed in writing by the Grantor. The Trustee shall reinvest the proceeds of any such sale or sales in such stocks (including common stocks), bonds or other securities as shall be directed in writing by the Grantor and, if practicable, at the prices stated in any such direction. The Trustee [fol. 36] may, however, advise the Grantor with respect to investments or reinvestments of the trust fund, and if the Grantor shall fail to give written directions concerning such proposed investments or reinvestments within twenty (20) days after the mailing by the Trustee of a request therefor to the address of the Grantor then on file with the Trustee, then the Trustee may proceed to act in the premises without the direction or consent of the Grantor and may invest and reinvest the trust fund, or any part thereof, in such stock (including common stocks), bonds and/or other securities as it may deem advantageous, and shall not be restricted to those investments legal for trustees under the laws of the State of New York. In the event that at any time, in the judgment of the Trustee, it is advisable to sell any of the securities or investments of the trust fund, and the Trustee shall not notify the Grantor at the address above provided for, and if the Grantor shall fail to give written directions concerning such suggested sale or sales within twenty (20) days after the mailing by the Trustee of said notification, then the Trustee may proceed to make such sale or sales as, in its unrestricted discretion, it may deem proper, and it shall be under no

liability for so doing. After the death of the Grantor sales and investments shall be made at the discretion of the Trustee, and the Trustee shall not be restricted to investments legal for Trustees under the laws of the State of New York. The Trustee is hereby expressly relieved from all liability and responsibility with respect to any sales, investment or reinvestment made by it in accord-
[fol. 37] ance with the terms hereof. Subject to the control reserved to the Grantor during his life the Trustee may retain any property which may herewith or hereafter be delivered to it to be held by it pursuant to the provisions of this agreement, and it is hereby expressly relieved from all liability and responsibility with respect to any such property received by it from the Grantor or any other person and from all liability and responsibility with respect to any sale, investment and/or reinvestment of such property made by it. The Trustee is authorized and empowered to cause any and all securities and property included in the trust fund to be registered in or transferred to its name as Trustee or to the name or names of its nominees, and to consent to, and take part in, the corporate action, consolidation, merger, adjustment, readjustment or reorganization which may affect any of the property included in the trust fund, or to take any other corporate action with respect to any of such securities, and in any such event, to pay over or charge to the principal of the trust fund any assessments which may at any time be levied or imposed in respect thereof.

All stock dividends shall be treated as principal and all rights of subscription to stock and/or to bonds, and the proceeds of all such rights, shall be treated as principal. All cash dividends shall be treated as income. The Trustee shall not be required to amortize any premiums paid, before or after the creation of this trust, in the purchase of securities or other investments for the trust fund.

[fol. 38] In case any property shall be added to this trust, pursuant to the provisions hereof, the property so added shall be subject to all the terms and provisions of

this agreement to the same effect as if such property were originally deposited hereunder.

The Grantor hereby reserves the right, and has the right, to amend, change, alter or modify this agreement, in whole or in part, with the consent of the Trustee, upon giving to the Trustee ten (10) days' notice in writing of his intention so to amend, change, alter or modify this agreement; and upon filing with the Trustee an instrument, in writing, approved by it, amending, changing, altering or modifying this instrument this agreement shall be deemed amended, changed, altered or modified, in accordance with the terms and provisions of such instrument or instruments.

The Grantor also reserves the right, and has the right, to revoke this trust in whole upon giving the Trustee ten (10) days written notice of his intention so to revoke; and the Grantor reserves, and has, the further right, at any time and from time to time, during his life, to withdraw any part of the corpus of the trust fund upon giving the Trustee ten (10) days written notice of his intention so to withdraw. Upon any such withdrawal or upon withdrawal on revocation of the trust, the Trustee shall be entitled to commissions at the rates in this agreement specified as if the trust had terminated pursuant to the terms of this agreement, such commissions to be computed upon the value of the property so withdrawn. Upon any [fol. 39] withdrawal the Trustee will assist the retransfer to, or upon the order of, the Grantor of any securities or property, standing in the name of the Trustee or its nominees, which shall be so withdrawn.

The Trustee hereunder, and any successor acting as Trustee hereunder, shall be entitled to deduct from income, and retain as commissions on income, commissions at the statutory rate allowed by the laws of the State of New York to testamentary trustees, and at the time of receiving the securities and property set forth on said Schedule A to receive one-half of commissions on principal at the rates allowed to testamentary trustees. The balance of commissions on principal shall be paid upon the termination or revocation of the trust, subject, however, to the foregoing provisions with respect to the pay-

ment of commissions on part or parts of the trust fund withdrawn prior to the termination of the trust as a whole.

THIRD: The Trustee hereby acknowledges receipt from the Grantor of the securities specified in the aforesaid Schedule A, and agrees to act as Trustee under this agreement, but the Trustee shall be under no obligation or duty to defend or engage in any suit or legal proceeding in respect of such trust fund, unless first indemnified to its satisfaction. It is agreed that all the powers herein given to the Trustee hereinabove named, shall be exercised by any successor Trustee appointed hereunder.

[fol. 40] IN WITNESS WHEREOF, the party of the first part, the Grantor aforesaid, has set his hand and seal, and initialled Schedule A, and the party of the second part, the Trustee aforesaid, has caused its corporate name to be hereunto subscribed, and Schedule A to be likewise initialled, by an Assistant Vice-President, and its corporate seal to be hereunto affixed and attested this 9th day of April, One thousand nine hundred and thirty.

/s/ HERMAN J. BOSCH (L.S.)
Grantor

IRVING TRUST COMPANY,

By H. M. ATKINS
Assistant Vice-President.
Trustee.

Attest:

EDWARD L. BISHOP
Assistant Secretary

[fol. 41]

STATE OF NEW YORK,)
) ss.
COUNTY OF NEW YORK.)

On this 9th day of April, 1930, before me personally came HERMAN J. BOSCH, to me personally known and known to me to be the individual described in and who executed the foregoing instrument, and he acknowledged to me that he duly executed the same for the purpose therein mentioned.

JOHN W. MOFFETT
Notary Public, Kings County
Clerk's No. 677, Register's No. 1252
New York Co. No. 551, Register's No. 1M379
My Commission Expires March 30, 1931

STATE OF NEW YORK,)
) ss.
COUNTY OF NEW YORK.)

On the 9th day of April, 1930, before me personally came H. M. Atkins to me known, who, being by me duly sworn, did depose and say that he resides in Kings County, N. Y. that he is an Assistant Vice-President of IRVING TRUST COMPANY, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

JOHN W. MOFFETT
Notary Public, Kings County
Clerk's No. 677, Register's No. 1252
New York Co. No. 551, Register's No. 1M379
My Commission Expires March 30, 1931

[fol. 42] EXHIBIT 2B TO STIPULATION

KNOW ALL MEN BY THESE PRESENTS:

WHEREAS, I HERMAN J. BOSCH, residing in Rye, New York, did execute on the 9th day of April, 1930, an agreement of trust dated said day, in which Irving Trust Company is named as Trustee and I, the grantor named in said instrument, having reserved therein the right

> "to amend, change, alter or modify this agreement, in whole or in part, with the consent of the Trustee, upon giving to the Trustee ten (10) days' notice in writing of his intention so to amend, change, alter or modify this agreement; and upon filing with the Trustee an instrument, in writing, approved by it, amending, changing, altering or modifying this instrument, this agreement shall be deemed amended, changed, altered or modified, in accordance with the terms and provisisons of such instrument or instruments."

NOW, THEREFORE, in exercise of the right so reserved by me, I do hereby amend and change said agreement as follows:

FIRST: I hereby amend and change Article FIRST of said agreement and I direct that in the event that I, the Grantor named in said agreement, shall not survive MARGARET BOSCH, the beneficiary named therein, then upon the death of said Margaret Bosch the Trustee shall pay, transfer and deliver the principal of the trust fund to the persons and/or corporations appointed to receive the same by the Last Will and Testament of said Margaret Bosch, and in default of a valid appointment in whole or in part shall divide the trust fund into two parts as nearly equal as may be and shall pay, transfer and deliver one of said parts to and among the persons entitled to the personal estate of said Margaret Bosch under [fol. 43] the intestate laws of New York, and the other of said parts to and among the persons then living who would have been entitled to receive my personal estate under the intestate laws of the State of New York if my death had occurred at that time.

SECOND: Except as herein modified, I do hereby ratify and confirm all the provisions of said agreement of trust dated April 9, 1930.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 6th day of February, 1931.

/s/ HERMAN J. BOSCH (L.S.)

STATE OF NEW YORK,)
) ss.
COUNTY OF NEW YORK.)

On this 6 day of February, 1931, before me personally came HERMAN J. BOSCH, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he acknowledged to me that he duly executed the same for the purposes therein mentioned.

/s/ JOHN W. MOFFETT
JOHN W. MOFFETT
Notary Public, Kings County
Clerk's No. 677, Register's No. 1252
New York Co. No. 551, Register's No. 1M379
My Commission Expires March 30, 1931

IRVING TRUST COMPANY, as Trustee under an Agreement of Trust dated April 9, 1930, between Herman J. Bosch as Grantor and Irving Trust Company, as Trustee, does hereby acknowledge receipt of the due notice [fol. 44] contained in the foregoing instrument executed

by said Grantor amending said trust agreement and the trust thereby created.

Dated,
February 6th, 1931.

IRVING TRUST COMPANY

By

/s/ H. M. ATKINS
Assistant Vice-President.

Attest:

/s/ G. J. DENIKE.
Assistant Secretary.

STATE OF NEW YORK,)
) ss.
COUNTY OF NEW YORK.)

On the 6th day of February, 1931, before me personally came HENRY M. ATKINS, to me known, who, being by me duly sworn, did depose and say, that he resides in the Borough of Brooklyn, City of New York, County and State of New York; that he is an Assistant Vice-President of IRVING TRUST COMPANY, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

/s/ JOHN W. MOFFETT
JOHN W. MOFFETT
Notary Public, Kings County
Clerk's No. 677, Register's No. 1252
New York Co. No. 551, Register's No. 1M379
My Commission Expires March 30, 1931

[fol. 45] EXHIBIT 3C TO STIPULATION

Mrs. Margaret Bosch
Hotel Commodore
Lexington Avenue & 42nd Street
New York 17, New York

Margaret Bosch Trust

Dear Mrs. Bosch:

Trust agreement dated April 9, 1930 made by Herman J. Bosch for your benefit, as amended by instrument dated February 6, 1931, provides that if Herman J. Bosch does not survive you, then

> "upon the death of said Margaret Bosch the trustee shall pay, transfer and deliver the principal of the trust fund to the persons and/or corporations appointed to receive the same by the Last Will and Testament of said Margaret Bosch".

This is what is known as a general power of appointment concerning which important legislation has recently been enacted by Congress, especially as to the tax aspect.

The matter is somewhat complicated, but we feel we should call to your attention that *October 31, 1951* is the deadline on or before which certain action must be taken, if deemed desirable, to overcome the tax consequences.

It is quite possible you have had this matter under consideration with your attorney and have decided to take no action with respect to your power of appointment. If you have not done so we respectfully suggest you consult him promptly.

Very truly yours

IRVING TRUST COMPANY
MARION QUELL

MQ:DD

[fol. 46] EXHIBIT 4D TO STIPULATION

MARGARET BOSCH TRUST U/A—$55,000

Herman J. Bosch, Grantor—"67" 42nd Street Branch Office A/C Hotel Commodore

October 19, 1951

Mr. Herman J. Bosch, grantor of the Margaret Bosch Trust, called at the bank today in connection with our letter regarding the general power of appointment which his wife, Margaret Bosch, has over the principal of the trust fund (see amendment dated February 6, 1931), and the taxability of it in Mrs. Bosch's estate. I told Mr. Bosch we had no idea of the size of his wife's estate, but if there is a possibility of its being over the $60,000 federal exemption, some action should be taken to reduce the power. He mentioned that he had considered making the trust irrevocable, but that a gift tax would then be involved; he wondered also if the gift coul[illegible]e extended over a period of years so that it would be exempt.

During the conversation I gathered that Mr. Bosch has a brother, age seventy-one, who is engeged with him in his business; Mrs. Bosch has a widowed sister who has two children for whom Mr. Bosch has undertaken to provide a home since the death of the father. Mr. Bosch thought his wife might wish to leave the corpus of this trust to that sister.

I spoke to Mr. Bosch again about his will drawn in 1931 and recommended that he see his attorney to consider whether it should be redrawn in view of the new tax laws which heve been passed in recent years; I suggested that perhaps under the marital deduction provisions he might wish to consider leaving one half of his estate outright to his wife and the other half in trust for her life with payment of the principtal upon her death. He said he would like to consider having his will redrawn, and it was arranged that he would see Dermod Ives, Esq. of Davies, Hardy, Schenck & Soons (in the absence of Mr. Soons who is ill) on Monday, October twenty-second at 2 o'clock.

Mr. Bosch who is about seventy-five years of age is believed to be worth about $750,000. He, at one time, owned the hairdressing establishments in the Hotel Biltmore and the Hotel Commodore. He sold the one in the Biltmore about ten years ago and is anxious to retire from business now, as he finds it quite a strain to get about; he stated also that his wife, who had been associated with him in the business, has been quite ill for the past two years, and that she had been able to find little if any relief.

M. Q.

[fol. 47] EXHIBIT 5E TO STIPULATION

KNOW ALL MEN BY THESE PRESENTS:

WHEREAS I, MARGARET BOSCH, am the life beneficiary of the trust created by a certain Agreement of Trust dated April 9, 1930 between Herman J. Bosch, as Grantor, and Irving Trust Company, as Trustee, which trust is now being administered by said Irving Trust Company as such Trustee; and

WHEREAS, by an amendment of said Agreement of Trust, dated February 6, 1931, made by said Grantor pursuant to the power thereby preserved to him, it is provided that in the event that said Grantor shall not survive me, the beneficiary therein named—

> "then upon the death of said Margaret Bosch the Trustee shall pay, transfer and deliver the principal of the trust fund to the persons and/or corporations appointed to receive the same by the Last Will and Testament of said Margaret Bosch, * * *"

and

WHEREAS I desire to release in part my contingent power of appointment under said Agreement of Trust in the manner contemplated by the "Powers of Appointment Act of 1951" amending Section 811(f) and Section 1000 (c) of the Internal Revenue Code of the United States of America, so that my said contingent power of appointment under said Agreement of Trust shall not be a general power of appointment,

NOW, THEREFORE, I, said Margaret Bosch, hereby renounce, relinquish, surrender and release my said con- [fol. 48] tingent power to appoint all or any part of said trust fund created by said Agreement of Trust dated April 9, 1930 made by Herman J. Bosch, as amended by instrument dated February 6, 1931, or any property which may hereafter form a part of said trust fund, in favor of myself, my estate, my creditors or the creditors of my estate.

Any attempted exercise of said power made by my Will which is inconsistent or in any way in conflict with this release and limitation by me of said power shall be void.

IN WITNESS WHEREOF, I have executed this instrument in duplicate this 25 day of October, 1951.

/s/ MARGARET BOSCH (L.S.)
MARGARET BOSCH

STATE OF NEW YORK)
) SS:
COUNTY OF WESTCHESTER)

On this 25 day of October, 1951, before me personally came MARGARET BOSCH, to me known and known to me to be the individual described in and who executed the foregoing instrument, and she duly acknowledged to me that she executed the same.

/s/ MARY E. HOEY
Notary Public
MARY E. HOEY
Notary P. St. of N.Y.
No. 60-181500
Qualified in Westchester Co.
Term expires March 30, 1953

[fol. 49] EXHIBIT 6F TO STIPULATION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

In the Matter of the Judicial Settlement of the Intermediate Account of Proceedings of IRVING TRUST COMPANY as Trustee under a certain Agreement of Trust, dated April 9, 1930, as amended, made by HERMAN J. BOSCH.

PETITION

Index No. 1216/1963

TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NASSAU

The petition of IRVING TRUST COMPANY, as Trustee under a certain Agreement of Trust, dated April 9, 1930, made by Herman J. Bosch, as amended, respectfully shows on information and belief that:

* * * *

6. Pursuant to said reservation of the right to amend, change, alter or modify said Agreement of Trust, said grantor by instrument dated February 6, 1931, amended and changed said Agreement of Trust as follows:

"FIRST: I hereby amend and change ARTICLE FIRST of said agreement and I direct that in the event that I, the Grantor named in said agreement, shall not survive MARGARET BOSCH, the beneficiary named therein, then upon the death of said Margaret Bosch, the Trustee shall pay, transfer and deliver the principal of the trust fund to the persons and/or corporations appointed to receive the same by the Last Will and Testament of said Margaret Bosch, and in default of a valid appointment in whole or in part shall divide the trust fund into two parts as nearly equal as may be and shall pay, transfer and deliver one of said parts to and among the persons entitled to the personal estate of said Margaret Bosch under the intestate laws of New York, and the other of said parts to and among the persons then living

who would have been entitled to receive my personal estate under the intestate laws of the State of New York if my death had occurred at that time."

[fol. 50] 7. By instrument dated October 25, 1951, Grantor's said wife, Margaret Bosch, partially released the power of appointment granted by said amendment dated February 6, 1931, as follows:

"WHEREAS I desire to release in part my contingent power of appointment under said Agreement of Trust in the manner contemplated by the 'Powers of Appointment Act of 1951' amending Section 811 (f) and Section 1000(c) of the Internal Revenue Code of the United States of America, so that my said contingent power of appointment under said Agreement of Trust shall not be a general power of appointment,

"NOW, THEREFORE, I, said Margaret Bosch, hereby renounce, relinquish, surrender and release my said contingent power to appoint all or any part of said trust fund created by said Agreement of Trust dated April 9, 1930 made by Herman J. Bosch, as amended by instrument dated February 6, 1931, or any property which may hereafter form a part of said trust fund, in favor of myself, my estate, my creditors or the creditors of my estate.

"Any attempted exercise of said power made by my Will which is inconsistent or in any way in conflict with this release and limitation by me of said power shall be void."

• • • •

9. Said grantor died a resident of 85 Cedar Street, Rye, New York, on April 6, 1957, leaving a Last Will and Testament which was duly admitted to probate by the Surrogate's Court of the County of Westchester on October 4, 1957, and on that date letters testamentary issued to Irving Trust Company, the Executor named in said decedent's will, which duly qualified and acted and continues to act as such Executor. Said grantor's gross [fol. 51] estate for tax, included the said trust for his

wife, Margaret Bosch, created by said Agreement of Trust dated April 9, 1930, as amended.

* * * *

The Executor of the grantor's will, on the advice of counsel, filed United States and New York estate tax returns in which it claimed a "marital deduction" for such April 9, 1930 trust, as amended. Upon the audit of the United States Estate Tax return, the District Director of Internal Revenue refused to allow a marital deduction for such trust and issued a notice of deficiency of estate tax on that ground.

There is pending in the Tax Court of The United States an action brought by the Executor to determine whether or not such April 9, 1930 trust, as amended, qualifies for the marital deduction. * * *

* * * *

In the Tax Court, the Executor contends that the April 9, 1930 trust, as amended, qualifies for the marital deduction on the ground that the instrument dated October 25, 1951, executed by Margaret Bosch, partially releasing the general power of appointment, was invalid and of no force and effect.

* * * *

WHEREFORE,

1. Your petitioner, Irving Trust Company, prays * * *

[fol. 52] 2. This Court determine at this time the validity of the instrument executed by Margaret Bosch on October 25, 1951, purportedly partially releasing her "contingent power of appointment" * * *

* * * *

IRVING TRUST COMPANY

By /s/ J. W. MOFFETT
Assistant Vice President
As Trustee
Petitioner.

DAVIES, HARDY & SCHENCK
Attorneys for Petitioner
Office and P.O. Address:
2 Broadway
New York 4, N.Y.

[fol. 53]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

In the Matter of the Judicial Settlement of the Intermediate Account of Proceedings of IRVING TRUST COMPANY as Trustee under a certain Agreement of Trust, dated April 9, 1930, as amended, made by HERMAN J. BOSCH.

ORDER TO SHOW CAUSE

Index No. 1216/1963

On reading the verified petition of Irving Trust Company, as Trustee under a certain Agreement of Trust dated April 9, 1930, made by Herman J. Bosch, as amended, and the verified account of proceedings of said Trustee;

* * * *

ORDERED, that the following persons, * * * show cause * * * why a final order * * * should not be made in the above-entitled proceeding, * * * determining at this time the validity of the instrument executed by Margaret Bosch dated October 25, 1951, purportedly partially releasing her "contingent power of appointment" * * *.

* * * *

[fol. 54] EXHIBIT 10J TO STIPULATION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK—SPECIAL TERM PART I

In the Matter of the Judicial Settlement of the Intermediate Account of Proceedings of IRVING TRUST COMPANY as Trustee under a certain Agreement of Trust, dated April 9, 1930, as amended, made by HERMAN J. BOSCH

Index No. 1216/1963

DAVIDSON, J.

In this proceeding to judically settle and allow the intermediate account of the Trustee under an inter vivos trust, a ruling is requested respecting the validity of an instrument executed by Margaret Bosch, wife of the Settlor of the Trust, dated October 25, 1951 purportedly partially releasing her contingent power of appointment.

On April 9, 1930 Herman J. Bosch created a trust which provided for the payment of income to his wife for her life with a reversion to the Grantor if his wife should predecease him, or to his estate if he should predecease his wife, leaving a will, or to his next of kin if he should die intestate.

The trust instrument reserved to the Grantor the right to alter or amend the trust at any time during his life with the consent of the Trustee, and the further right without the consent of the Trustee or any other person to revoke the Trust in whole or in part.

On February 6, 1931 the Grantor exercised his right to amend the trust to provide that his wife, Margaret [fol. 55] Bosch, should have a general power of appointment over the property of the trust *exercisable by Will* if she survived the Grantor. The power in the Grantor to further alter, amend or revoke the trust in his lifetime was undisturbed by this amendment.

On October 25, 1951, during the lifetime of the Grantor, his wife, Margaret Bosch, executed an instrument by

which she purported to effect a partial release of the general power of appointment granted to her by the trust instrument as amended. The Grantor, Herman Bosch, died on April 6, 1957.

The applicable provision of the law is Section 183, Subdivision 1 of the Real Property Law, which states:

> "Any power which is exercisable by deed, by will, by deed or will, or otherwise, whether general or special, other than a power in trust which is imperative, is releasable, either with or without consideration, by written instrument signed by the grantee and delivered as hereinafter provided."

This section, although a part of the Real Property Law, applies to powers of appointment over personal property as well as to powers over real property. MATTER OF NEW YORK TITLE AND MORTGAGE COMPANY 150 Misc. 488; IN RE GOLDOWITZ WILL 145 Misc. 300; MATTER OF COOKSEY'S ESTATE 182 N.Y. 92.

In order that the donee of a power of appointment release any rights under that power, the donee must have the right to exercise the power at the time the purported release is made. It seems clear that the donee of power of appointment cannot exercise it prior to its creation. MATTER OF PIFFARD 111 N.Y. 410.

[fol. 56] In the instant case, Margaret Bosch, on October 25, 1951, sought to effect a partial release of the power of appointment over the property of the trust. At that time she lacked the power to exercise any rights under the trust instrument. Her power with respect to the trust instrument came into being upon the death of the Grantor on April 6, 1957. A power of appointment created under a revocable deed of trust, which power shall be exercised by will, may not be exercised while the Settlor of the trust is still alive. Since she could not have exercised the power of appointment on October 25, 1951 she could not have effected a valid partial release of the power on that date. Hence her purported partial release of the power of appointment on October 25, 1951 was a nullity. MATTER OF PIFFARD, supra.

Accordingly, the purported partial release by Margaret Bosch on October 25, 1951 of the power of appointment granted to her by the trust instrument was a nullity. Settle order.

/s/ IRVIN D. DAVIDSON
J.S.C.

Dated: November 8, 1963

[fol. 57]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 306—September Term, 1965

(Argued May 25, 1966)

Docket No. 29883

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF HERMAN J. BOSCH, Deceased,
IRVING TRUST COMPANY, Executor, RESPONDENT

Before: FRIENDLY, HAYS and FEINBERG, *Circuit Judges*

OPINION—July 6, 1966

Petition for review of a decision of the Tax Court, Raum, *Judge* (43 T. C. 120 (1964)), holding that the interest of decedent's surviving spouse in an *inter vivos* trust created by decedent qualifies for the marital deduction under the terms of Section 2056(b)(5) of the Internal Revenue Code of 1954, 26 U. S. C. § 2056(b)(5).

Affirmed.

[fol. 58]

BENJAMIN M. PARKER, Attorney for the Department of Justice, Washington, D. C. (Richard M. Roberts, Acting Assistant Attorney General, Lee A. Jackson and Robert N. Anderson, Attorneys, on the brief), *for Petitioner.*

JOHN W. BURKE, New York, N. Y. (John A. Clark, Dermond Ives and Davies, Hardy & Schenck, New York, N. Y., of counsel), *for Respondent.*

HAYS, *Circuit Judge*:

The Commissioner petitions for review of a decision of the Tax Court which held that the Commissioner had erroneously disallowed the sum of $70,222.04 as a marital deduction under Section 2056(b)(5) of the Internal Revenue Code of 1954, 26 U. S. C. § 2056(b)(5).[1] We affirm the Tax Court.

[fol. 59] The facts are fairly simple and are not in dispute.

On April 9, 1930 the decedent set up a trust by the terms of which the income was to be paid to his wife during her lifetime. Upon the death of the wife the corpus was to be paid to the grantor or his estate. The trust was amendable and revocable.

On February 6, 1931 decedent amended the trust instrument to grant to his wife a general power of appointment. She was empowered to appoint by her will the corpus of the trust to any "persons and/or corporations." The amendment provided for a disposition over in the event the wife failed to exercise her power of appointment.

On October 25, 1951, the wife executed a document by which she purported to release a portion of her general

---

[1] "(5) *Life estate with power of appointment in surviving spouse.*—In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, * * * with power in the surviving spouse to appoint the entire interest, * * * (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse—

(A) the interest * * * thereof so passing shall, for purposes of subsection (a), be considered as passing to the surviving spouse, and

(b) no part of the interest so passing shall, for purposes of paragraph (1)(A), be considered as passing to any person other than the surviving spouse.

This paragraph shall apply only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events."

power of appointment under the trust and to convert it into a special power of appointment.[2]

[fol. 60]* It appears from the document itself and it is readily conceded by the trustee, which proposed to Mr. and Mrs. Bosch the execution of the release, that the purpose of the release was to take advantage of the Powers of Appointment Act of 1951, Ch. 165, 65 Stat. 91, amend-

---

[2] "KNOW ALL MEN BY THESE PRESENTS:

WHEREAS I, MARGARET BOSCH, am the life beneficiary of the trust created by a certain Agreement of Trust dated April 9, 1930 between Herman J. Bosch, as Grantor, and Irving Trust Company, as Trustee, which trust is now being administered by said Irving Trust Company as such Trustee; and

WHEREAS, by an amendment of said Agreement of Trust, dated February 6, 1931, made by said Grantor pursuant to the power thereby preserved to him, it is provided that in the event that said Grantor shall not survive me, the beneficiary therein named—

> 'then upon the death of said Margaret Bosch the Trustee shall pay, transfer and deliver the principal of the trust fund to the persons and/or corporations appointed to receive the same by the Last Will and Testament of Said Margaret Bosch, * * *'

and

WHEREAS I desire to release in part my contingent power of appointment under said Agreement of Trust in the manner contemplated by the 'Powers of Appointment Act of 1951' amending Section 811(f) and Section 1000(c) of the Internal Revenue Code of the United States of America, so that my said contingent power of appointment under said Agreement of Trust shall not be a general power of appointment,

NOW, THEREFORE, I, said Margaret Bosch, hereby renounce, relinquish, surrender and release my said contingent power to appoint all or any part of said trust fund by said Agreement of Trust dated April 9, 1930 made by Herman J. Bosch, as amended by instrument dated February 6, 1931, or any property which may hereafter form a part of said trust fund, in favor of myself, my estate, my creditors or the creditors of my estate.

Any attempted exercise of said power made by my Will which is inconsistent or in any way in conflict with this release and limitation by me of said power shall be void.

IN WITNESS WHEREOF, I have executed this instrument in duplicate this 25 day of October, 1951.

/s/ Margaret Bosch (L.S.)
MARGARET BOSCH"

ing Int. Rev. Code of 1939, § 811(f) (now Int. Rev. Code of 1954, § 2041), then recently enacted, and thus "to prevent the assets of the trust being taxed as part of Margaret Bosch's estate."

On April 6, 1957 Herman Bosch died. His executor claimed a marital deduction for the value of the trust. The Commissioner determined that the trust did not qualify for the marital deduction and asserted a federal tax deficiency based upon the disallowance in the amount of $70,222.04, the value of the corpus of the trust.

The executor filed a petition in the Tax Court for a redetermination of the deficiency. While the action was pending in the Tax Court, the trustee, which was also executor of the estate of Herman Bosch, brought a proceeding in the New York Supreme Court for a settlement of its account as trustee. In connection with the proceeding in the New York Supreme Court, the trustee asked for a determination of the validity of Mrs. Bosch's release of part of her power of appointment. Respondent stipulated and conceded that the New York proceeding was instituted "at least in part for the purpose of [fol. 61] affecting [the] outcome" of the case before the Tax Court. The trustee's petition in the New York court described the proceedings then pending in the Tax Court, and stated the position taken in that proceeding by the executor.

The issue in the state proceeding was whether the release executed by Mrs. Bosch on October 25, 1951 was effective. Three briefs were filed in the New York proceeding, one for Mrs. Bosch, one for the trustee, and one by a guardian *ad litem* in behalf of a minor interested in the trust by reason of being a possible beneficiary in the event Mrs. Bosch died without exercising her power of appointment. All three briefs argued that the release was a nullity. No argument for the validity of the release was presented to the court.

There were twenty-two persons having the same interest as the infant who was represented by the guardian *ad litem*. Although they received notice of the proceeding, none of them appeared.

The state court held that Mrs. Bosch's purported release was a nullity.[3]

---

[3] "Matter of Irving Trust Co. (Bosch)—In this proceeding to judicially settle and allow the intermediate account of the trustee under an inter vivos trust, a ruling is requested respecting the validity of an instrument executed by Margaret Bosch, wife of the settlor of the trust, dated October 25, 1951, purportedly partially releasing her contingent power of appointment. On April 9, 1930, Herman J. Bosch created a trust which provided for the payment of income to his wife for her life with a reversion to the grantor if his wife should predecease him, or to his estate if he should predecease his wife, leaving a will, or to his next of kin if he should die intestate. The trust instrument reserved to the grantor the right to alter or amend the trust at any time during his life with the consent of the trustee, and the further right without the consent of the trustee or any other person to revoke the trust in whole or in part. On February 6, 1931, the grantor exercised his right to amend the trust to provide that his wife, Margaret Bosch, should have a general power of appointment over the property of the trust *exercisable by Will* if she survived the grantor. The power in the grantor to further alter, amend or revoke the trust in his lifetime was undisturbed by this amendment. On October 25, 1951, during the lifetime of the grantor, his wife, Margaret Bosch, executed an instrument by which she purported to effect a partial release of the general power of appointment granted to her by the trust instrument as amended. The grantor, Herman Bosch, died on April 6, 1957. The applicable provision of the law is section 183, subdivision 1, of the Real Property Law, which stated: 'Any power which is exercisable by deed, by will, by deed or will, or otherwise, whether general or special, other than a power in trust which is imperative, is releasable, either with or without consideration, by written instrument signed by the grantee and delivered as hereinafter provided.' This section, although a part of the Real Property Law, applies to powers of appointment over personal property as well as to powers over real property (Matter of N. Y. Title & Mortgage Co., 150 Misc. 488; In re Goldwitz Will, 145 Misc. 300; Matter of Cooksey's Estate, 182 N. Y. 92). In order that the donee of a power of appointment release any rights under that power, the donee must have the right to exercise the power at the time the purported release is made. It seems clear that the donee of power of appointment cannot exercise it prior to its creation (Matter of Piffard, 111 N. Y. 410). In the instant case, Margaret Bosch, on October 25, 1951, sought to effect a partial release of the power of appointment over the property of the trust. At that time she lacked the power to exercise any rights under the trust instrument. Her power with respect to the trust instrument came into being upon the death of the grantor on April 6, 1957. A power of appointment created under a revocable deed of trust, which

[fol. 62] The Tax Court decided to accept the New York decision and gave the following reasons for doing so:

1. The New York court had jurisdiction over the parties and subject matter of the proceeding, and its judgment was final and conclusive as to those parties. Therefore, Mrs. Bosch now has a general power of appointment which she could exercise in [fol. 63] favor of herself, her estate, her creditors, or the creditors of her estate.

2. Decisions of the Supreme Court of the State of New York represent legal precedent for courts throughout the state, unlike decisions of local courts with limited geographical jurisdiction whose decisions are not binding upon other courts of the state.

3. The Commissioner was fully aware of the proceeding in the New York court and could have sought the opportunity to present his views to that court. Indeed, he agreed to the continuance of the hearing before the Tax Court so that the New York proceeding might be brought to a conclusion.

4. The New York court rendered a reasoned opinion and reached a deliberate conclusion.

5. The New York court's decision, which is binding upon Mrs. Bosch, may have certain offsetting tax consequences in respect to her own estate tax. The New York decree establishing that she has a general power of appointment will result in the inclusion in her gross estate of any property passing under her exercise of that power, and the record indicates that it is not reasonable to assume that

---

power shall be exercised by will, may not be exercised while the settlor of the trust is still alive. Since she could not have exercised the power of appointment on October 25, 1951, she could not have effected a valid partial release of the power on that date. Hence her purported partial release of the power of appointment on October 25, 1951, was a nullity (Matter of Piffard, supra). Accordingly, the purported partial release by Margaret Bosch on October 25, 1951, of the power of appointment granted to her by the trust instrument was a nullity. Settle order." N. Y. L. J., November 15, 1963.

this power of appointment will remain unexercised.* Thus, the state court decree was more than "a label for past events that would affect the present litigation; it authoritatively determined the nature of the power of appointment with potentially adverse tax consequences at a later date."

[fol. 64] The Tax Court stated that it was not necessary for it to say that it was "bound" by the New York decision. It held that it was sufficient to state, for all of the above reasons, that it would accept the New York decision "as an authoritative exposition of New York law and adjudication of the property rights involved."

In deciding whether the Tax Court ascribed proper effect to the state decision, a few preliminary observations may be helpful. We believe that much of the confusion in the cases is caused by the failure of the courts carefully to formulate the issue. For example, it is quite clear that the state decision is not binding upon the federal courts because the situation is covered by the principle of *res judicata*. See *Freuler* v. *Helvering*, 291 U. S. 35, 43 (1934). Obviously the Commissioner is not bound by the state decision in a *res judicata* sense, since he was not a party to the litigation which resulted in the decision. It may be that it would be desirable to hold the Commissioner bound when he has received notice and an opportunity to appear as in this case, but that is clearly not the law now, and any such change in the law would no doubt require legislative action. Similarly the federal courts are not bound in this situation by the rule of *Erie R.R. Co.* v. *Tompkins*, 304 U. S. 64 (1938). It is for this reason that most of the Commissioner's argument must be considered to be beside the point. The task here is not to discover the general New York law applicable to releases of powers of appointment. That may well be the subject of the required search in a case which concerns a taxpayer whose own special status

* The Tax Court said "[W]e cannot reasonably assume that she will permit that power to remain unexercised, for there are indications in the record that the immediate natural objects of her bounty do not include all of the many relatives of her husband who would take in default of her exercise of the power."

under New York law has never been authoritatively determined by a New York tribunal. In the determination of the present case we are not required to take issue with our learned colleague, Judge Friendly, whose brilliant [fol. 65] lecture *In Praise of Erie—And of the New Federal Common Law*, 39 N. Y. U. L. Rev. 383 (1964) is quoted in the Commissioner's Reply Brief. We may indeed agree with him that the correct view, that "the Erie doctrine applies, whatever the ground for federal jurisdiction, to any issue or claim which has its source in state law," is set forth by Judge Waterman in *Maternally Yours, Inc.* v. *Your Maternity Shop, Inc.*, 234 F. 2d 538, 541 n. 1 (2d Cir. 1956). The reference in the quoted passage is to the great run of cases in which the federal courts are obliged to search out the general principle of state law in order to apply that principle to a case under consideration. It does not refer, and was never intended to refer, to the question of whether or not a federal court is to accept a state determination of the rights under state law of a party to a federal action. In the latter situation, which is that in the case at bar, the party comes into the federal court with his rights already fixed by a decision of a state tribunal. There is no occasion to inquire into the general law of the state to ascertain what those rights are.

The issue is, then, strictly speaking, not whether the federal court is "bound by" the decision of the state tribunal, but whether or not a state tribunal has authoritatively determined the rights under state law of a party to the federal action.

This is clearly the effect of *Sharp* v. *Commissioner*, 303 U. S. 624 (1938), reversing, 91 F. 2d 802 (3d Cir. 1937), *Blair* v. *Commissioner*, 300 U. S. 5 (1937) and *Freuler* v. *Helvering*, 291 U. S. 35 (1934). In the *Blair* case, the issue was whether a certain trust was a spendthrift trust under the law of Illinois. The Circuit Court of Appeals, examining the general law of Illinois on the subject, held it to be a spendthrift trust. The trustees thereupon brought an action in the Illinois courts to obtain a con- [fol. 66] struction of the will and the Appellate Court of Illinois, an intermediate appellate court, held that the trust was not a spendthrift trust. The United States

Supreme Court ruled that the Commissioner was required to accept the Illinois decision as dispositive. The Court said:

> "In this instance, it is not necessary to go beyond the obvious point that the decision was in a suit between the trustees and the beneficiary and his assignees, and the decree which was entered in pursuance of the decision determined as between these parties the validity of the particular assignments." 300 U. S. at 10.

In deciding whether the determination of the rights under state law of a party to a federal action has been authoritative, the majority of federal courts in which the question has been raised have refused to accept the result in cases which were non-adversary.[4] However, there is very respectable authority for the proposition that, if the state decision is bending on the parties as to their rights under state law (as it would not be if it resulted from fraud or collusion), it is conclusive as to those rights for purposes of federal taxation. In *Gal-*
[fol. 67] *lagher* v. *Smith*, 223 F. 2d 218, 223 (3d Cir. 1955), the court said:

> "An adjudication of such a question of title by a court of the state must accordingly be given effect, not because it is res judicata against the United

---

[4] See the discussion and the cases cited in the following:

10 Mertens, *Law of Federal Income Taxation*, Ch. 61 (Zimet Revision 1964); Braverman and Gerson, *The Conclusiveness of State Court Decrees in Federal Tax Litigation*, 17 Tax L. Rev. 545 (1962); Colowick, *The Binding Effect of a State Court's Decision in a Subsequent Federal Income Tax Case*, 12 Tax L. Rev. 213 (1957); Holzman, *Impact of State Law upon Fed. Tax.*, 42 Taxes 240 (1964); Sacks, *Binding Effect of Nontax Litigation in State Courts*, N. Y. U. 21st Inst. on Fed. Tax., 277 (1963); Stephens & Freeland, *The Role of Local Law and Local Adjudication in Federal Tax Controversies*, 46 Minn. L. Rev. 223 (1961); Note, *Binding Effect of a Nonadversary State Court Decree in a Federal Tax Determination*, 33 Fordham L. Rev. 705 (1965); Note, *Effect of State Court Decrees in Federal Tax Litigation*, 30 U. of Chi. L. Rev. 569 (1963); Note, *The Role of State Law in Federal Tax Determination*, 72 Harv. L. Rev. 1350 (1959).

States, but because it is conclusive of the parties' property rights which alone are to be taxed. So far as those parties are concerned the law of the state is what the state court has declared and applied in their case. If the state court's judgment has binding final effect under the state law the rights of the parties can only be what the court has held them to be. It is for this reason that the federal court should not in a case of this kind make an independent examination and application of state law. For if it reaches a different conclusion from the state court as to what the parties' rights should be under the state law its decision will not change those rights which will necessarily remain what the state court has declared them to be."

See *Flitcroft* v. *Commissioner*, 328 F. 2d 449 (9th Cir. 1964); *Estate of Darlington* v. *Commissioner*, 302 F. 2d 693 (3d Cir. 1962); *Eisenmenger* v. *Commissioner*, 145 F. 2d 103 (8th Cir. 1944); *Sharpe* v. *Commissioner*, 107 F. 2d 13 (3d Cir. 1939), cert. denied, 309 U. S. 665 (1940).

It may fairly be said, we think, that the question is an open one in this circuit. (However, compare *Kelly's Trust* v. *Commissioner*, 168 F. 2d 198 (2d Cir. 1948).) The decision in *Second National Bank* v. *United States*, 351 F. 2d 489 (2d Cir. 1965), was based, as the court makes [fol. 68] clear,[5] on the holding that the determination

[5] "The trial court after carefully considering the arguments and the many relevant decisions concluded that 'the decrees of the Connecticut Probate Court—which is not a court of record and most of the judges of which are laymen, not lawyers—under no circumstances can be construed as binding and conclusive upon a federal court in construing and applying the federal revenue laws.' 222 F. Supp. at 457. This court is in accord with the trial court's conclusion as to the effect of the state decree, see Estate of Peyton v. Commissioner, 323 F. 2d 438 (8th Cir. 1963), since under Connecticut law the Probate Court's decisions are not binding on the state's higher courts, Heiser v. Morgan Guaranty Trust Co., 150 Conn. 563, 192 A. 2d 44 (1963), and are even subject to collateral attack in another probate district, Culver's Appeal from Probate, 48 Conn. 165, 172-174 (1880). Under the circumstances, it was necessary 'to make a finding as to whether the proceedings in the Probate Court were collusive or nonadversary in nature' and the court properly refrained from so doing." 351 F. 2d at 494.

of the Connecticut Probate Court was not authoritative in Connecticut.

An able Tax Court judge quite explicitly undertook to balance several relevant factors (see pp. 2494-2495 *supra*) before deciding to accept the New York judgment as authoritative of the rights of parties. We, too, have considered all of the circumstances and feel that the decision below was correct. We hold that the New York judgment, rendered by a court which had jurisdiction over parties and subject matter, authoritatively settled the rights of the parties, not only for New York, but also for purposes of the application to those rights of the relevant provisions of federal tax law. Mrs. Bosch now has a general power of appointment under the trust. The corpus of the trust therefore qualifies for the marital deduction.

The decision of the Tax Court is affirmed.

FRIENDLY, *Circuit Judge* (dissenting):

The Commissioner's appeal concerns an important problem in the administration of the revenue laws—the conclusiveness of a judgment of a lower state court, typically in an intra-family setting, that determines property interests entailing federal tax consequences. The Supreme [fol. 69] Court has not spoken to the point for nearly thirty years. Difficulties arise because of the practical unacceptability of the strictly logical polar positions; that the judgment of an inferior state court not binding as *res judicata* can never be more than rebuttable evidence of state law, and that any such judgment which is effective as a determination of property rights among the parties is conclusive upon the federal fisc. The former position could operate unfairly in the many cases where persons having a genuine controversy over property rights desire resolution by an appropriate local tribunal without wishing to press their differences to the highest court of the state. The latter would permit citizens, unwilling to accept the tax consequences of actions taken by them or their decedents, to evade federal taxes by taking advantage of an unwitting lower state tribunal.

The compounding of factual variables, the somewhat intractable nature of the problem, and the cryptic character of the Supreme Court's rather dated pronouncements, see *Freuler* v. *Helvering*, 291 U. S. 35, 43-47 (1934); *Blair* v. *C. I. R.*, 300 U. S. 5, 9-10 (1937); and *Sharp* v. *C. I. R.*, 303 U. S. 624 (1938), have created widespread conflict among the circuits. *Contrast, e.g., Saulsbury* v. *United States*, 199 F. 2d 578 (5 Cir. 1952), cert. denied, 345 U. S. 906 (1953); *Stallworth's Estate* v. *C. I. R.*, 260 F. 2d 760 (5 Cir. 1958); *Sweet's Estate* v. *C. I. R.*, 234 F. 2d 401 (10 Cir.), cert. denied, 352 U. S. 878 (1956); and *Faulkerson's Estate* v. *C. I. R.*, 301 F. 2d 231 (7 Cir.), cert. denied, 371 U. S. 887 (1962), refusing to give effect to state judgments, *with Gallagher* v. *Smith*, 223 F. 2d 218 (3 Cir. 1955); *Darlington's Estate* v. *C. I. R.*, 302 F. 2d 693 (3 Cir. 1962), and *Goodwin's Estate* v. *C. I. R.*, 201 F. 2d 576 (6 Cir. 1953), doing the opposite. The Fourth Circuit has declined to [fol. 70] give effect to a lower state court judgment with respect to a widow's power of appointment rendered under circumstances quite similar to those here, *Pierpont's Estate* v. *C. I. R.*, 336 F. 2d 277, 281-82 (1964), cert. denied, 380 U. S. 908 (1965), distinguishing its earlier decision in *Pitts* v. *Hamrick*, 228 F. 2d 486 (1955), and expressly refusing to follow the rule of the Third Circuit which my brothers adopt. The Eighth Circuit seems to be less deferential to state judgments now than it used to be. *Contrast Straight's Trust* v. *C. I. R.*, 245 F. 2d 327 (1957), and *Peyton's Estate* v. *C. I. R.*, 323 F. 2d 438 (1963), *with Helvering* v. *Rhodes' Estate*, 117 F. 2d 509 (1941); and *Eisenmenger* v. *C. I. R.*, 145 F. 2d 103 (1944). The Ninth Circuit appears to be more so. *Contrast Flitcroft* v. *C. I. R.*, 328 F. 2d 449 (1964), *with Newman* v. *C. I. R.*, 222 F. 2d 131 (1955), and *Wolfsen* v. *Smyth*, 223 F. 2d 111 (1955). The conflict among the judges is echoed among the commentators. Most of them disapprove the acquiescent attitude now identified with the Third Circuit. See, e.g., Cardozo, Federal Taxes and the Radiating Potencies of State Court Decisions, 51 Yale L. J. 783 (1942); Cahn, Local Law in Federal Taxation, 52 Yale L. J. 799, 818-19 (1943); Oliver, The Nature of

the Compulsive Effect of State Law in Federal Tax Proceedings, 41 Calif. L. Rev. 638 (1953); Stephens and Freeland, The Role of Local Law and Local Adjudications in Federal Tax Controversies, 46 Minn. L. Rev. 223, 242-51 (1961); Braverman & Gerson, The Conclusiveness of State Court Decrees in Federal Tax Litigation, 17 Tax L. Rev. 545 (1962); Note, Effect of State Court Decrees in Federal Tax Litigation: A Proposal for Judicial Reform, 30 U. Chi. L. Rev. 569 (1963); Sacks, The Binding Effect of Nontax Litigation in State Courts, N. Y. U. [fol. 71] 21st Inst. on Fed. Tax 277 (1963). But the Third Circuit also has a defender. See Note, The Binding Effect of a Nonadversary State Court Decree in a Federal Tax Determination, 33 Fordham L. Rev. 705 (1965). With our own court uncommitted,[1] I regret my brothers' vote to align ourselves with the rather mechanical view of the Third Circuit rather than the more realistic one of the Fourth and Fifth, thereby needlessly handicapping the Commissioner in the fair and equal enforcement of the federal revenue laws. I would hold that when it is evident that state court litigation has been brought primarily to have an effect on federal taxes, the judgment of an inferior state court adjudicating property rights is entitled to little weight, and that when the state court has not had the benefit of a fair presentation of both sides of the controversy, it is entitled to none. While these principles will not resolve all cases, they are ample to decide this one.

When Herman Bosch died in 1957, the critical date for determining taxes on his estate, his wife had only a special power of appointment over the trust whose status is here in question. Admittedly this was all she purported to have and all she or her husband thought she had. So long as Mr. Bosch lived, no one had questioned the validity of the partial release of the quandam general power, least of all the experienced attorneys who had recom-

[1] The decision in *Kelly's Trust* v. *C.I.R.*, 168 F. 2d 198 (2 Cir. 1948), is inapposite in my view since the deference given to the state court adjudication was on the basis that its "appeal made it adversary, . . . especially as, on appeal from the state-court judgment, one judge dissented." 168 F. 2d at 198-99.

mended it. Nor was there any basis for doing so. There had indeed been New York decisions that a power of appointment by will, whether or not contingent on the [fol. 72] donee's surviving the donor, could not be released since this would defeat the purpose of preserving the donee's freedom of action until death. *Learned* v. *Tallmadge*, 26 Barb. 443 (1856); *Farmers' Loan and Trust Co.* v. *Mortimer*, 219 N. Y. 290 (1916). But, upon enactment of the Revenue Act of 1942, thenceforth taxing all property subject to a preexisting general power of appointment unless this was released by a specified date,[2] New York's legislature moved swiftly to permit holders to rid themselves of such powers in whole or in part. The statute, Real Property Law § 183, was phrased in the broadest terms:

> "Any power which is exercisable by deed, by will, by deed or will, or otherwise, whether general or special, other than a power in trust which is imperative, is releasable . . . with respect to the whole or any part of the property subject to such power and may also be released in such manner as to reduce or limit the persons or objects, or classes or persons or objects, in whose favor such power would otherwise be exercisable."

Nothing in the language suggests a desire to except powers that were, like Mrs. Bosch's, contingent on the donee's surviving the settlor or destructible by the settlor's amending or revoking the trust;[3] "exercisible"

---

[2] Initially this was January 1, 1943, 56 Stat. 944. Later Congress successively granted postponements until November 1, 1951, and made clear that a partial release would qualify. See Powers of Appointment Act of 1951. 65 Stat. 91; S. Rep. No. 382, 82d Cong., 1st Sess. 2-8, 1951 U. S. Code Cong. & Ad. News 1530-37; Int. Rev. Code of 1954, § 2041(a)(1).

[3] We have been cited to no New York cases that had ever drawn this distinction. The one New York case cited by the Supreme Court Justice, *In re Piffard*, 111 N. Y. 410 (1888), held that although a power of appointment granted by will could not have been exercised as such by a donee who predeceased the testator, the latter's will should be read as incorporating the legatee's disposition.

[fol. 73] would not normally be read as including only cases where the exercise would be effective if the donee died the next minute. And there can be no reason why New York's legislature should thus fail in part to enable its citizens to do what Congress contemplated they might. Unless such a contingent power was partially released before the end of the grace period accorded by Congress, the settlor's death would leave the donee in the same unenviable position as any other holder of a general power created on or before October 21, 1942, where any exercise, although in favor of persons other than the donee, his estate, or their creditors, would result in the inclusion in his estate of the property over which he held the power—just what the release here suggested by the trustee in October 1951 was meant to avoid. Since there is no apparent reason why the New York legislature should have wished to discriminate against holders of contingent or revocable powers and the language affords no indication that it did, it is not surprising that what appears to be the only New York case raising the problem in a truly adversary context held that the contingent nature of a power of appointment, in that instance upon death of the donee without issue, did not prevent release under § 183, *In re Woodcock's Will*, 19 Misc. 2d 268, 186 N. Y. S. 2d 447, 450 (Surr. Ct. Westchester Co. 1959).[4] This was the unpropitious background in which the at- [fol. 74] torneys who had counseled that Mrs. Bosch convert her general power into a special one in 1951 determined to engage in what the Commissioner has aptly characterized as *post mortem* estate planning, regaining

---

[4] Any shadow of doubt has been dissipated by § 146 of the new Article 5 of the Real Property Law, added by Laws 1964, c. 864, effective June 1, 1965, which was not called to the attention of the Tax Court—or to us. This section provides that the donee of a power not presently exercisable cannot contract to make an appointment but "the provisions of this section shall not, in any way, abridge the ability of the donee of a power of appointment not presently exercisable, to release his power, in whole or in part, pursuant to the provisions of section one hundred and forty-three . . ." Section 143 is old § 183. It is thus apparent that no other New Yorker in Mrs. Bosch's situation can ever obtain a ruling like that made here.

for her through the New York courts a general power she no longer had at Mr. Bosch's death.

The only reason advanced by the trustee for seeking a declaration as to the validity of the release was the effect on the trust's liability for its share of the taxes on Mr. Bosch's estate—allegedly only $930 if the release was not valid but $21,479 if it was. The trustee's petition to the New York court gave no reason why determination of that question by the Tax Court in the litigation there pending would not fully protect it. The brief for Mrs. Bosch, joining in the trustee's request that the release be declared invalid, made no suggestion that she desired to avail herself of the released power to appoint by will to herself, her estate or her creditors. Indeed, her regaining the general power made it less likely that she would exercise it in any respect. Under the Internal Revenue Code of 1954, § 2041(a)(1), while any exercise of the power would cause the trust property to be included in her estate, failure to exercise it would produce the optimum result of availability of the trust property for the marital deduction in Mr. Bosch's estate and freedom from taxation in his widow's—a feat which could not have been accomplished by revocation of the trust during Mr. Bosch's life. In default of appointment the trust was to be divided equally between the then next of kin of the two spouses; the interest of the many persons cited as presumptive remaindermen, taken as a class, thus also favored a declaration of invalidity which would make exercise in favor of Mrs. Bosch's relatives less likely, as [fol. 75] was conceded in the brief filed by a guardian *ad litem* for a relative of Mr. Bosch, the only remainderman to take a position. Mrs. Bosch in no way indicated that if the release was held valid, she would exercise her special power in favor of any particular person, who might thus be interested in urging validity. The briefs, filed by the trustee, Mrs. Bosch and the guardian, treated the invalidity of the release as almost beyond reasonable debate. The attorneys for the trustee did not inform the court on what basis they had recommended action in 1951 which they now considered so plainly a nullity—something as to which they would have been questioned sharp-

ly in a truly adversary proceeding. The sole relevant authority, *In re Woodcock's Will, supra,* was not cited, and the legislative purpose behind § 183 was not explored. Under these circumstances it is not to be wondered that a judge sitting in the busy motion part of the Supreme Court for New York County should have erroneously ratified the parties' unanimous contention, citing only the inapposite decision of *In re Piffard,* see n. 3.

The case thus fits perfectly the description cited by way of contrast in *Freuler* v. *Helvering, supra,* where "all the parties joined in a submission of the issues and sought a decision which would adversely affect the Government's right to additional . . . tax." 291 U.S. at 45. The problem in this area has been bedeviled by iteration of terms such as "collusive" or "non-adversary." To require proof of collusion in the normal sense of prearrangement would impose a nigh impossible burden on the Commissioner; yet a court shrinks from using such an opprobrious epithet when no prearrangement has been shown. Again, while a proceeding in which, for example, a life tenant with what appears to be a limited right to invade princi- [fol. 76] pal seeks a declaration of absolute ownership is surely "adversary" in a formal sense, it may not be in a practical one, as when the life tenant is an aged mother seeking to qualify a bequest for the marital deduction and the remaindermen are her adult sons. See *Peyton's Estate* v. *C. I. R., supra,* 323 F. 2d 438. What makes this case so easy is that the state court proceeding had no significant purpose other than the reduction of tax liability; Mrs. Bosch was not shown to have the slightest intention of using the general power the New York court was led to thrust upon her, or even the special one if she was held to have only that. In a practical sense the decision was thus devoid of any effect except on taxes.[5] There was

[5] It is immaterial that if Mrs. Bosch should choose to exercise the power in favor of her own relatives, she would subject her estate to a tax—apparently much smaller than the sum here at issue—which would have been saved if the release had not been attacked. The *post mortem* estate planning condemned in *Pierpont's Estate* v. *C. I. R., supra,* 336 F. 2d 277, and *Peyton's Estate* v. *C. I. R., supra,* 323 F. 2d 438, would also have increased the estate tax payable on the widow's death.

no question affecting the integrity of the corpus, as in *Freuler*, or the assignability of the beneficiary's right to income, as in *Blair* v. *C. I. R.*, *supra*. In such a case the considerations for respecting the determination of a lower court which is not the product of a weighing of opposing arguments approach zero.[6] One well-considered article has said: "Whenever all parties to the state court pro- [fol. 77] ceeding approve and have never opposed the proffered result, and the decree embodying it appears to serve no purpose other than to avoid federal taxation, the decree should not be regarded as determinative of the state law property rights purportedly adjudicated." Braverman & Gerson, *supra*, 17 Tax L. Rev. at 576. Another comment suggests that "if a taxpayer, intending to avoid tax liability, institutes a state suit, and if no interested party presents the argument urged by the Commissioner, then the state court judgment should be considered to have been collusively obtained." Note, *supra*, 30 U. Chi. L. Rev. at 581. A third proposes that a state court adjudication of property rights be respected "unless it was obtained by collusion, i.e., for the sole and single purpose of defeating the federal tax imposed upon those rights." Sacks, *supra*, N. Y. U. 21st Inst. on Fed. Tax. at 295. It is unnecessary to choose among these formulations; all call for reversal here.

---

[6] I fail to see the significance attributed by my brothers to the Commissioner's knowledge of the New York proceeding or his courtesy in awaiting its outcome. For twenty years the announced policy of the Internal Revenue Service, surely well known to the appropriate committees of Congress, has been not to intervene in such suits and to move to dismiss if made a party. Mim. 6134 (1947). The reasons are obvious—insufficient staff, unfamiliarity with state procedures, and lack of standing to intervene and thus to appeal unless, indeed, the Commissioner were to concede the very point of the conclusiveness of the state judgment which he properly disputes. In the absence of contrary congressional direction the United States is entitled to litigate liability for federal taxes in its own courts. Compare *Leiter Minerals, Inc.* v. *United States*, 352 U. S. 220 (1957).

[fol. 78]

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

* * * *

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF HERMAN J. BOSCH, DECEASED, IRVING TRUST COMPANY, EXECUTOR, RESPONDENT

JUDGMENT—July 6, 1966

Appeals from The Tax Court of the United States

This cause came on to be heard on the transcript of record from The Tax Court of the United States and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

[fol. 79]

* * * *

[fol. 80]

[Clerk's Certificate to foregoing transcript omitted in printing]

[fol. 81]

SUPREME COURT OF THE UNITED STATES

No. ——, October Term, 1966

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF HERMAN J. BOSCH, DECEASED, IRVING TRUST COMPANY EXECUTOR

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby extended to and including November 3rd, 1966

/s/ John M. Harlan
Associate Justice of the Supreme Court of the United States

Dated this 4th day of October, 1966

SUPREME COURT OF THE UNITED STATES

No. 673, October Term, 1966

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF HERMAN J. BOSCH, DECEASED, ETC.

ORDER ALLOWING CERTIORARI—December 5, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The case is placed on the summary calendar and set for oral argument immediately following No. 240.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 240592 452